

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Accelerating Wireline Broadband)	WC Docket No. 17-84
Deployment by Removing Barriers to)	
Infrastructure Investment)	

**REPLY COMMENTS OF
ACA CONNECTS – AMERICA’S COMMUNICATIONS ASSOCIATION
ON CTIA PETITION FOR DECLARATORY RULING**



I. INTRODUCTION AND SUMMARY

ACA Connects – America’s Communications Association (“ACA Connects”) hereby submits reply comments in response to the Public Notice issued by the Federal Communications Commission’s (“Commission’s”) Wireless Telecommunications Bureau and Wireline Competition Bureau seeking comment on the CTIA Petition for Declaratory Ruling.¹ ACA Connects’ reply comments focus solely on CTIA’s request for the Commission to issue a declaratory ruling clarifying that utilities cannot seek to impose terms on attachers that conflict

¹ *Wireless Telecomms. Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling, and CTIA Petition for Declaratory Ruling*, WC Docket No. 17-84, *et al.*, Public Notice, 34 FCC Rcd 8099 (2019) (“Public Notice”). In accordance with the Commission’s instructions, ACA Connects files these reply comments only in WC Docket No. 17-84, as they focus solely on CTIA’s Petition for Declaratory Ruling. See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv., et al.*, WC Docket No. 17-84, *et al.*, Order Granting Extension of Time, DA 19-978, para. 4 (Sep. 30, 2019); see also CTIA, Petition for Declaratory Ruling, WC Docket No. 17-84, *et al.* (Sep. 6, 2019) (“CTIA Petition”).

with the pole attachment rules adopted to implement Section 224 of the Communications Act, as amended.² In its initial comments, ACA Connects supported CTIA's request, explaining that the statute and the Commission's rules would not alleviate the problems they were designed to address if utilities are permitted to require attachers to accept terms inconsistent with the law.³ ACA Connects' position was supported by, among others, Crown Castle,⁴ T-Mobile,⁵ and ExteNet Systems.⁶ As Crown Castle noted, "because the pole owner has far more leverage to secure favorable terms due to its sole control over access to its pole," the Commission should clarify that "its discussion of 'bargained-for-attachment solutions' in the OTMR Order only permits parties to customize an agreement within the bounds of the Commission's rules."⁷

By contrast, CTIA's request was opposed by a number of utilities that are pole owners.⁸ One utility group claimed that CTIA's request "contradicts the plain language of Section 224, and violates the Commission's consistent precedent in support of privately negotiated

² 47 U.S.C § 224.

³ Comments of ACA Connects – America's Communications Association on CTIA Petition for Declaratory Ruling, WC Docket No. 17-84, 6-7 (Oct. 29, 2019) ("ACA Connects Comments").

⁴ Comments of Crown Castle International Corp., WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, 46-49 (Oct. 29, 2019) ("Crown Castle Comments").

⁵ Comments of T-Mobile USA, Inc., WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, 24-25 (Oct. 29, 2019).

⁶ Comments of ExteNet Systems, Inc., WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, 8-10 (Oct. 29, 2019) ("ExteNet Comments").

⁷ Crown Castle Comments at 48-49.

⁸ Opposition to Petition for Declaratory Ruling of the Power Coalition, WC Docket No. 17-84, 18-23 (Oct. 29, 2019) ("Power Coalition Comments"); Opposition to Petition for Declaratory Ruling of Edison Electric Institute, Utilities Technology Council, National Rural Electric Cooperative Association, WC Docket No. 17-84, 23-27 (Oct. 29, 2019) ("EEI Comments"); Initial Comments of the Electric Utilities in Opposition to CTIA's Petition for Declaratory Ruling on Pole Attachment Issues, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, 22-32 (Oct. 29, 2019) ("Electric Utilities Comments").

agreements.”⁹ Another utility group contended that the Commission has always preferred to have the statute and rules implemented through good-faith negotiations between utilities and attachers and, if these fail, the attacher can enforce its rights by signing the agreement and then filing a complaint with the Commission (*i.e.*, “sign and sue”).¹⁰

As ACA Connects explains below, the utilities’ legal and policy claims would render the statute and the Commission’s rules virtually meaningless, especially for smaller providers seeking to attach. A negotiation between utilities and attachers is unlikely to ever be equitable – in the public interest – because utilities have unreasonable leverage, a fact that underlies the statute and the Commission’s rules. Further, filing a formal pole attachment complaint with the Commission is a remedy beyond the reach of many ACA Connects members, which generally are smaller providers that lack the resources to pursue such relief. Moreover, even where a provider may have sufficient resources to engage in a formal complaint proceeding, it would be inefficient for all parties to have to do so when rights can be clarified up front with clear rules. Therefore, to enable providers to accelerate deployments of facilities to provide telecommunications, cable, and ancillary broadband services, the Commission should ensure the statute and rules have meaning and are effective. That is, the Commission should clarify that the rights the Commission provided attachers regarding pole attachment issues are the baseline for any negotiations with pole owners¹¹ and utilities are not acting in good faith if they seek to have attachers negotiate such rights away.

⁹ Power Coalition Comments at 18.

¹⁰ EEI Comments at 23-25.

¹¹ See CTIA Petition at 31 (“[T]he OTMR/Moratoria Order only permits parties to customize an agreement within the bounds of the Commission’s rules. For example, the pole owner and prospective attacher can negotiate provisions regarding individual locations, types of poles, local rights-of-way policies, and variations in terrain. That said, such negotiation cannot result in an agreement that conflicts with the procedures, timelines, and requirements set forth in the Commission’s rules.”).

II. THE COMMISSION SHOULD CLARIFY THAT UTILITIES CANNOT SEEK TO NEGOTIATE AGREEMENTS WITH ATTACHERS THAT CONTAIN TERMS THAT CONFLICT WITH THE POLE ATTACHMENT RULES

For many reasons, the Commission should act promptly to grant CTIA's request that the Commission clarify that utilities may not seek terms from attachers that conflict with the Commission's pole attachment rules.¹² To begin with, as the Commission explained in its brief to the U.S. Court of Appeals reviewing the recently adopted pole attachment rules, because providers of cable and telecommunications services often require access to utility poles to deploy their facilities, Congress enacted, and the Commission implements and enforces, Section 224 to ensure utilities cannot exercise market power and charge monopoly rents for such attachments.¹³ The Commission further noted that it exercises its authority to implement the statute by adopting rates, terms, and conditions for attachments to ensure they are just and reasonable¹⁴ and that allowing "'utilities to define the terms and conditions of attachment' would effectively nullify 'the grant of rulemaking authority to the Commission' under Section 224(b), rendering that provision 'meaningless.'"¹⁵ In other words, the Commission's charge pursuant to the statute is clear: utility pole owners have leverage to extract unreasonable terms from attachers and the Commission needs to act, by adopting and enforcing rules, to ensure that pole owners cannot do so, including through negotiations.

Not only should the Commission act because utilities have an inherent incentive and ability to leverage attachers in pole attachment negotiations, but there is evidence in the record

¹² *Id.* at 28.

¹³ *Am. Elec. Power Serv. Corp. v. FCC*, Case No. 19-70490, Brief for Respondents, 4-5 (9th Cir. Aug. 22, 2019).

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 8 (citing *Implementation of Section 224 of the Act, A Nat'l Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, para. 93 (2011)).

that utilities are, in fact, exercising their leverage to undermine the statute and rules. For instance, in its initial comments, ACA Connects pointed to examples provided by its members showing that utilities often demand smaller providers enter into agreements inconsistent with the statute and rules.¹⁶ Crown Castle explained in its comments that, contrary to the statute and rules, utilities often demand that Crown Castle enter into agreements whereby it releases them from all liability for virtually any damage resulting from an attachment, even where such damage is caused by the utility or its personnel or contractors.¹⁷ Crown Castle also provided an example of a utility that demanded a rate in excess of the Commission's formula and claimed "that it was a collaborative, bargained-for provision."¹⁸ Thus, the harms from utilities exercising their leverage are tangible and material.

In their comments, utilities did not argue that they do not possess bargaining power in negotiations with attachers.¹⁹ Rather, they first claimed that the statute and the Commission's decisions indicate a "preference for privately negotiated pole attachment solutions."²⁰ ACA Connects recognizes that attachment requests may have unique aspects and that negotiated agreements are the preferred mechanism to address these. However, the statute and rules will mean little, if anything, if they do not act as a bound on negotiations to rein in the bargaining

¹⁶ ACA Connects Comments at 7, n. 22.

¹⁷ Crown Castle Comments at 48.

¹⁸ *Id.* at 49. For further examples from Crown Castle, see Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle International Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84, WT Docket No. 17-79, 4 (July 25, 2018).

¹⁹ See, e.g., EEI Comments at 26 (stating "[t]he playing field is no less level now than it was in the 2010-2011 timeframe"). ACA Connects does not quibble with this statement, only noting the field tilted in favor of the utilities a decade ago and continues to do so.

²⁰ Electric Utilities Comments at 23-27. See EEI Comments at 23-26 (arguing the Commission "favors privately negotiated solutions between utility pole owners and attachers").

power of utilities. Further, the Commission has recognized this reality. For instance, in the *Wireline Infrastructure Order*, the Commission did not mandate negotiations but rather “welcome[d]” them as a way to deal with “distinct situation[s] and encourage parties to seek superior solutions.”²¹ As ExteNet explained, “[a]n agreement in which an attacher is required to surrender its pole attachment rights as a *quid pro quo* for pole access is not a ‘superior solution.’”²²

Utilities additionally argued that attachers could “sign and sue” if they believed an attachment agreement was contrary to the Commission’s rules.²³ They claimed that this right “removes any incentive that otherwise would exist to negotiate pole attachment terms that the Commission would find to be unjust, unreasonable, or discriminatory.”²⁴ However, rights mean little if the aggrieved party cannot reasonably pursue an action to enforce them. As ACA Connects has often explained, smaller providers seeking attachments lack the financial resources to pursue a formal complaint and so are subject to the whims of utilities who well-understand that fact. Even Crown Castle, which has greater resources to pursue a formal complaint, raised concerns about the resources and time needed “to effectively file a complaint.”²⁵ Thus, the utilities are wrong to assert that the formal complaint process somehow eliminates their incentive and ability to pursue unreasonable or discriminatory rates, terms, and conditions.²⁶

²¹ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv., et al.*, WC Docket No. 17-84, *et al.*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, para. 13 (2018) (“*Wireline Infrastructure Order*”).

²² ExteNet Comments at 9, n. 32 (citing *Wireline Infrastructure Order* at para. 13).

²³ *See, e.g.*, EEI Comments at 26.

²⁴ *Id.*

²⁵ Crown Castle Comments at 46.

²⁶ *See* Power Coalition Comments at 23.

Formal pole attachment complaints are not only largely ineffective, particularly for smaller providers, but the complaint process itself is an inefficient means to resolve disputes, costing too much, taking too long, and producing limited results.²⁷ The best way for the Commission to facilitate reasonable and durable pole attachment agreements is by ensuring that negotiations occur in an environment where parties have relatively equal bargaining power. But for that to occur between pole owners and attachers, the Commission's rules need to have meaning up front, when negotiations are in process, and not after the fact. Accordingly, the Commission should view "sign and sue" for what it really is – a limited and commercially inefficient means of recourse available, at best, only to the largest attachers.

For all of these reasons, ACA Connects urges the Commission to grant CTIA's request and clarify that utilities may not seek to impose terms on attachers that conflict with – and

²⁷ Utilities argue that the paucity of formal pole attachment complaints indicates that private negotiations are working. See, e.g., Power Coalition Comments at 22. However, attachers file few formal pole complaints because they are so resource- and time-intensive and have such limited effect. The best indication that the entire attachment process still places attachers at a disadvantage is that the Commission finds it necessary to address their concerns every few years. In other words, the Commission has yet to rein in the bargaining power of utilities.

thereby undermine – the Commission’s rules and that utilities that attempt to impose such terms are not acting in good faith.

Respectfully submitted,

By: 

Matthew M. Polka
President and Chief Executive Officer
ACA Connects – America’s Communications
Association
Seven Parkway Center
Suite 755
Pittsburgh, PA 15220
(412) 922-8300

Thomas Cohen
J. Bradford Currier
Kelley Drye & Warren LLP
3050 K Street, NW
Washington, DC 20007
(202) 342-8518
Counsel to ACA Connects – America’s
Communications Association

Ross J. Lieberman
Senior Vice President of Government Affairs
ACA Connects – America’s Communications
Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

November 20, 2019